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FILED
DEC 10 1958
JAMES R. BROWNING, Clerk

No. 508

In the Supreme Court of the United States

OCTOBER TERM, 1958

HENRY MARKS, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1958. The petition for a writ of certiorari was filed on November 10, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial judge properly excluded the results of a lie detector test taken by petitioner on his own initiative and offered by him to support his claim that he was entrapped into giving a bribe.

STATEMENT

Following a jury trial, held in the United States District Court for the District of New Mexico, petitioner was convicted of offering and giving a bribe in the sum of $1,000 to a Special Agent of the Internal Revenue Service, in violation of 18 U.S.C.201 (R.2,3,90). He was sentenced to imprisonment for 18 months and fined $1,000 (R. 3, 93). The Court of Appeals unanimously affirmed the conviction (Pet. App. A).

The pertinent facts are these:

1. In January 1957, Peter F. Geissler, of the Intelligence Division of the Internal Revenue Service was assigned to, and commenced, the investigation of the income tax returns of Hub Enterprises, Inc., of which petitioner was the managing officer, to determine whether there was evasion by that company of income taxes for the years 1953-1955 (R. 7-8). In the course of this investigation agent Geissler had contact with petitioner on several occasions in connection with obtaining certain records needed for the investigation (R. 8-9, 11-12, 14-16). According to the agent, on the morning of April 24, 1957, he called petitioner with reference to certain papers. Petitioner told the agent that he was in the process

of assembling the records and that the agent should join him for a cup of coffee. When the agent suggested "The Court Cafe," petitioner said it was too crowded and suggested that they meet on a certain street corner (R. 18). Before leaving his office, Giessler had himself searched by his fellow Agent Wilson, who removed all his money, and kept him under surveillance during his meeting with petitioner (R. 18-19, 44, 51-55).

At this meeting, after rejecting petitioner's first suggestion that they take a ride, the agent accepted petitioner's further suggestion that they have a cup of coffee (R. 20). While having coffee, petitioner wanted to know the progress of the investigation, inquired about the health of the agent's son and stated that he could refer him to an excellent physician. Petitioner told the agent that he would like to send him a sewing machine for his wife, and that he could get him a frigidaire quite inexpensively. When advised that the agent's wife had been a secretary, petitioner said that he was forming a new concern and would gladly consider her for a secretarial position (R. 20-21). Finally, petitioner said: "Pete, I would like to see this matter brought to a halt, to clean it up. I would give you a thousand dollars to terminate the investigation." The agent responded that it was up to him (R. 21). Thereupon, petitioner said that he would have to go to the bank to get the money and they agreed to meet a short time later in a nearby drugstore (R. 22). At this meeting, petitioner handed over a roll of bills totalling $1,000.

The agent then placed him under arrest (R. 22-24)[1]

2. Petitioner's defense was entrapment. He testified that Agent Geissler phoned him on the morning of the 24th of April, and when he advised the agent that the papers requested were not yet ready, the agent nonetheless suggested the meeting (R. 63). Petitioner's version of this meeting was that the agent asked him for a thousand dollars to close the case, saying that he had a sick child and his wife was unemployed (R. 63-64). The petitioner denied offering the agent a sewing machine. He admitted telling the agent he could get him appliances wholesale and offering to get him an appointment with a specialist for his child (R. 64). Petitioner testified that he gave the agent $1,000 which he borrowed from Hub Enterprises because he was frightened by the agent's ultimatum (R. 65, 66). He denied that he suggested the $1,000 pay-off, claiming that the proposition originated with agent Geissler (R. 65).

3. Just before petitioner rested his case, he offered to submit the results of a lie-detector test, taken on his own initiative, which he claimed established that the agent first proposed the $1,000 payment (R. 79). The test had been conducted by Albert H. Hathaway, a former captain of the New Mexico Police Department. The trial judge, sustaining the government's objection, excluded the evidence (R. 79-80), questioning the pertinency of the test, since, at best, it would

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[1] The first intimation that Geissler had that a bribe attempt would be made came on April 21, 1957 in conversation with a Mr. Scanlon who purportedly was representing petitioner (R. 27).

show only that the defendant was not lying but would not prove what agent Geissler had done. The trial judge submitted the entrapment issue to the jury after a careful charge (R. 84-85). In upholding the trial judge's exclusion of the lie-detector evidence, the Court of Appeals noted the unanimity of judicial opinion holding against its admissibility (Pet. App. A 15).

ARGUMENT

The single issue pressed by petitioner is that reversible error was committed by the trial judge by virtue of his refusal to admit the lie detector evidence. We think this claim is plainly erroneous.

Although petitioner acknowledges the almost complete accord of judicial opinion to the effect that polygraph examinations are inadmissible in evidence,[2] he nevertheless asks this Court to override these pre-

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[2] See *e.g.*, *Frye* v. *United States*, 293 Fed. 1013 (C.A. D.C.); *State* v. *Bohner*, 210 Wisc. 651, 657-658; *People* v. *Becker*, 300 Mich. 562, 565-566; *State* v. *Lowry*, 163 Kan. 622, 627-630. Petitioner notes, as an exception to this general view, a decision by a lower court of New York in *People* v. *Kenny*, 167 Misc. 51. But this decision was never subject to appellate review and shortly after it was rendered, the results of a lie-detector test, deriving from the very same polygraph technique utilized in the *Kenny* case, were excluded in *People* v. *Forte*, 167 Misc. 868, a holding affirmed by the New York Court of Appeals (279 N.Y. 204).

Of course, different considerations obtain where the parties stipulate to the results of the test and consent to its admission. For an extensive review of the decided cases on this subject, see Inbau and Reid, *Lie Detection and Criminal Interrogation*, 122-127, 132-135 (3d ed. 1953); Wicker, *The Polygraphic Truth Test and The Law of Evidence*, 22 Tenn. L. Rev. 711, 715-723 (1953).

cedents on the ground that the technique is now scientifically accurate and has attained general scientific recognition. We see no occasion for this Court to consider the question. While constant advances are being made in the lie detector technique, and it is proving useful as an investigative tool, the view of authoritative commentators, as well as the courts, is that the polygraphic examination has not yet achieved the precision or scientific recognition essential to judicial admissibility.

Two leading authorities in the lie-detector field, Fred E. Inbau and John E. Reid, in their book *Lie Detection and Criminal Interrogation* (3rd ed. 1943), point out that, in order to meet the test of admissibility, lie detection first must be shown to have "a reasonable measure of precision in its indications," and, second, must be accepted by the "field of science to which it belongs." (p. 122). In neither of these two particulars, the authors conclude, has lie detection yet attained success. Among the defects noted the following seem most significant. There is no standardization as yet as to instrumentation, procedure in testing, or interpretation (p. 129).[3] Closely allied with this consideration is the fact that qualifications for examiners have not been sufficiently well stand-

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[3] See also, Arther, *Blood Pressure Rises on Relevant Questions In Lie Detection—Sometimes an Indication of Innocence Not Guilt*. 46 Journ. of Cr. Law 112 (1955); Burack; *A Critical Analysis of The Theory, Method, and Limitations of The "Lie Detector,"* 46 Journ. of Cr. Law 414 (1955); Sell, *Deception Detection and the Law*, 11 U. of Pitt. L. Rev. 210, 222 (1950).

ardized to enable a judge to determine if a particular examiner has the necessary expertise. There is no educational requirement nor uniform practice as to the experience necessary to operate a polygraph. "Under such circumstances it would be relatively easy for incompetent or dishonest persons to represent themselves as lie-detector experts and be given an opportunity to render inaccurate or perjured testimony for the party by whom they are employed" (*Ibid.*, p. 129).[4]

These factors attain particular significance since there might be a greater need for precision before admissibility is extended to the results of a deception test than would be required as to other scientific evidence (*e.g.*, ballistics, toxicology). Thus the latter type of scientific evidence is often not conclusive upon the crucial issues of the litigation and there would be a lesser chance of injustice flowing from the fact that the expert testimony might be erroneous. On the other hand, particularly in a criminal case, the results of the polygraph examination would normally go to the ultimate question of guilt or innocence and be deemed extremely significant. In light of this, there would obviously have to be exceptionally high standards with respect to polygraphic equipment, methodology, analysis and qualifications of the ex-

[4] See similarly Inbau, *Some Avoidable Lie-Detector Mistakes*, 40 Journ. of Cr. Law 791 (1950). Even an author who favors the admission of the tests recognizes that accepted professional qualifications have not been set for the examiners. Wicker, *The Polygraphic Truth Test and the Law of Evidence*, 22 Tenn. L. Rev. 711 (1953).

aminers, before such tests should be admitted, a condition which does not exist at the present time.[5]

As to the second criterion of admissibility—scientific acceptance and recognition—the polygraph technique does not yet pass muster. In a survey conducted in 1953, sixty-four per cent of the members of the American Psychological Association who replied to questionnaires disagreed with the statement that: "The fear of being found out and or conscious efforts to deceive are the main cause of significant reactions in polygraphic tests of deception." And a substantial body of pychological opinion, forty-nine per cent of the psychologists queried, would not favor the judicial admission of the tests. See Levitt, *Scientific Evaluation of The "Lie Detector,"* 40 Ia. L. Rev. 440, 456-457 (1955).[6]

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[5] As observed in a recent criticism: "Considering the tremendous weight that testimony obtained with a lie detector would carry in the courtroom, it is doubtlessly well that the courts have thus far been hypercautious about admitting it. The testimony of the ballistics or fingerprint expert is usually significant, but it is not always crucial. On the other hand, a demonstrated lie or truth to the question, 'Did you kill X?' would invariably be perfectly conclusive. Mechanical lie detection does not yet seem to have advanced to the point where it is dependable enough to furnish the entire basis of a court decision." Levitt, *Scientific Evaluation of The "Lie Detector,"* 40 Ia. L. Rev. 440, 458 (1955).

[6] This questionnaire was sent as well to the American Society for the Advancement of Criminology, The Society for the Detection of Deception, manufacturers of polygraphic equipment, and polygraph examiners. A full analysis of the results of the survey is contained in Cureton, *A Consensus As To The Validity of Polygraph Procedures*, 22 Tenn. L. Rev. 728 (1953).

Again, in 1944, the Forensic Section of the American Psychiatric Association adopted a resolution concluding that a polygraphic examination "can give valuable results *only in the hands of thoroughly trained physicians and psychologists* who will evaluate the data derived by applying other available methods and making use of all independently obtainable evidence" (emphasis added). Eliasberg, *Forensic Psychology*, 19 So. Cal. L. Rev. 349, 362 (1946).

In sum, while it may be that much of the scientific opinion is in the nature of " 'arm-chair' criticism," as suggested by Inbau and Reid, *supra*, p. 130, n. 75, still as these authors themselves conclude (pp. 131-132):

> . . . we should not be too hasty in our acceptance of proposed innovations. In the case of the lie-detector technique such a cautious attitude will operate not only in the best interests of the administration of justice but also to the ultimate advantage of the technique itself. A premature acceptance of the test results as legal evidence would undoubtedly occasion such a series of abuses and miscarriages of justice as to stigmatize forever the technique in the field of law as well as of science. It seems much wiser, therefore, to await a further development and standardization of the technique before admitting the test results as evidence in civil or criminal cases.

CONCLUSION

For the foregoing reasons we do not believe that, at the present time, "reason and experience" or the

consensus of scientific opinion warrant a change, by judicial ruling, of the existing law that evidence of lie detector tests is inadmissible whether offered by the defense or prosecution. Cf. *Hawkins* v. *United States*, No. 20, decided November 24, 1958. It is respectfully submitted that the petition for certiorari should be denied.

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DECEMBER 1958.

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